In Civil Appeal No 577 of 1987:

> plus further interest at the rate of 8% per annum as from 16 September 1986 to date of settlement ...

In Civil Appeal No 578 of 1987:

> together with interest thereon at the rate of 16% per annum on monthly rests calculated from 31 July 1985 to the date of realization ...

In Civil Appeal No 579 of 1987:

> together with interest thereon at the rate of 8% per annum from 16 November 1985 to date of realization ...

It was contended that as the amount of interest due is *calculable* it need not be quantified in the bankruptcy notice. The learned judge agreed and held that the decision of this court in *Low Mun* v *Chung Khiaw Bank Ltd*[1] did not apply to the facts of the cases before him.

It was argued that if the interest is not quantified it is sufficient that it be capable of calculation by stating the rate of interest and the period such interest is payable; and if this is done, the bankruptcy notice is good. The authority for this proposition is said to be the passage in *Low Mun*[1] at p 265 where the court said :

> Clearly, the bankruptcy notice was bad in law as it contained demand for payment of the whole judgment debt within seven days when parts of the whole debt had not been or could not be quantified, and as such were incapable of being made the subject of execution and consequently incapable of being complied with.

We do not agree. The judgment must be read as a whole. The words 'or could not be' appearing in the passage is a statement of fact of that case and not of law. That this is so is apparent from the sentences immediately following the passage, where the court said:

> Non-compliance with the demand to pay such unascertained sums cannot constitute an act of bankruptcy. *The demand for payment in the notice must not only be quantified but must also be the correct sum owing as at the date of the notice.*
> (Emphasis supplied)

Again at p 266 the court said:

> Instead, the creditor merely reproduced the terms of the judgment on the interest and costs in the bankruptcy notice without quantifying the amounts claimed to be due. The Bankruptcy Act provides expressly that the notice must be to pay the judgment debt 'in accordance with the terms of the judgment'. ... Consequently, we are of the view that when you have the judgment in the usual form that we have here, a bankruptcy notice under the Act must require payment of quantified sum or sums alleged to be due according to the terms of the judgment as at the date of issue of bankruptcy notice. The duty is on the creditor to state the correct amount due, and there is no obligation imposed on the debtor to make inquiries if the amount demanded is ambiguous or unascertained. By demanding payment for unspecified sums in the bankruptcy notice, we hold that such demand is not in accordance with the terms of the judgment, and applying the rule of strict construction, the notice cannot be deemed to fall within s 3(1)(i) of the Bankruptcy Act. The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven-day period. Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and that failure to comply with such notice is not an act of bankruptcy, and a bankruptcy petition founded on it must necessarily fail.

For a bankruptcy notice to be valid, therefore, it should state the exact amount due as at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid bankruptcy. He does not have to make any calculations or enquiries. How the exact amount is arrived at should be particularized as follows:

Particulars of Amount Claimed

Amount adjudged in the Sessions Court at Kota Bharu in Summon No 565 of 1985 dated 16th day of April 1986	$21,924.76
Interest at the rate of 8% per annum from 1 October 1985 to 2 October 1986*	1,753.98
Costs	685.00
Total	$24,363.74

*Date of bankruptcy notice

In the present appeals, the interest sums payable have not been quantified. The bankruptcy notice in all five cases are therefore invalid ab initio and consequently all subsequent proceedings to these bankruptcy notices are a nullity. For these reasons, we allowed the appeals with costs and set aside the orders made by the learned judge.

Appeal allowed.

Solicitors: *C Jegathesan*; *Mokhtar & Co*; *Foo Say Ghee & Co*; *HS Lim Teo & Partners.*

Reported by *Prof Ahmad Ibrahim*

Lee Weng Tuck & Anor v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) – CRIMINAL APPEAL NO 42 OF 1988
MOHAMED AZMI, HARUN AND AJAIB SINGH SCJJ
20 MARCH AND 12 APRIL 1989

Criminal Procedure – Charge of trafficking in dangerous drugs – Plea of guilty – Whether learned trial judge was correct in holding that appellants' plea of guilty was unequivocal – Whether learned judge was correct in refusing to allow appellants to retract their plea – Criminal Procedure Code (FMS Cap 6), ss 173(b), 178 & 342

In this case the appellants had been jointly charged with another accused for trafficking in dangerous drugs in furtherance of a common intention. The appellants had originally

claimed trial but subsequently they indicated that they wished to change their plea. In exercise of his discretion the learned judge decided to deal with the appellants first and adjourned the trial of the other accused, who had claimed trial. The learned trial judge accepted their pleas of guilty and convicted them. He then adjourned the case for sentence. At the resumed hearing, the appellants applied to withdraw their plea of guilty and gave their reasons. The learned trial judge refused to allow the appellants to change their plea and sentenced both of them to death. They appealed. The main issues at the appeal were whether the learned judge was correct in holding that the appellants' plea of guilty was unequivocal and also whether he was correct in law in refusing to allow the appellants to retract their plea notwithstanding the reasons given.

Held, allowing the appeal:

(1) A plea of guilty must be valid and unequivocal and in order to determine the validity of a plea of guilty the safeguards which must be followed are:

(a) the court must ensure that that it is the accused himself who wishes to plead guilty;
(b) the court must ascertain that the accused understands the nature and consequences of his plea;
(c) the court must ascertain that the accused intends to admit without qualification the offence alleged against him;
(d) in capital cases a plea of guilty might be accepted by the court if proper safeguards were taken to ensure that the plea was valid and unequivocal. Whether a guilty plea was valid and unequivocal was a question of mixed law and fact but the validity of the plea must first be established before the plea could be said to be unequivocal.

(2) In capital cases, a trial judge had the discretionary power to permit an accused person to change his plea at any time before sentence, but the discretion must be exercised judicially and on valid grounds. Where, however, the accused wished to change his plea of guilty for reasons which give rise to a reasonable doubt as to the validity or unequivocality of the guilty plea due to failure to take proper safeguards, then the court has no discretion but to permit the accused to retract his plea.

(3) On the facts and circumstances of this case, there was a breach of the proper safeguards when the pleas of guilty of the appellants were accepted. There were grave doubts that the appellants understood the nature and consequences of their plea. Equally there were grave doubts that the appellants intended to admit without qualification the offence alleged against them. In the circumstances the appellants ought to have been allowed to change their plea of guilty to their original claim to be tried.

(4) The appeals of the appellants were allowed and the conviction and sentence set aside. There should be a retrial before another judge.

Cases referred to

1 *Toh Ah Loh & Mak Thim* v *R* [1949] MLJ 54 (refd)
2 *Seet Ah Ann* v *PP* [1950] MLJ 293 (refd)
3 *Loh Hock Seng & Anor* v *PP* [1980] 2 MLJ 13 (refd)
4 *PP* v *Oo Leng Swee & Ors* [1981] 1 MLJ 247 (refd)
5 *Chang Liang Sang & Ors* v *PP* [1982] 2 MLJ 231 (refd)
6 *PP* v *Tan Hock Hai* [1983] 1 MLJ 163 (refd)
7 *R* v *McNally* [1954] 1 WLR 933; [1954] 2 All ER 372 (refd)
8 *PP* v *Sam Kim Kai* [1960] MLJ 265 (refd)
9 *Abdul Mormin* v *PP* [1939] MLJ 323 (refd)
10 *Wong Sin Yeow* v *PP* [1968] 1 MLJ 230 (refd)
11 *S (An Infant) by Parsons (His Next Friend)* v *Recorder of Manchester & Ors* [1970] 2 WLR 21 (refd)
12 *PP* v *Jamalul Khair* [1985] 1 MLJ 316 (refd)
13 *R* v *Riley* [1963] 3 All ER 949 (refd)
14 *R* v *Tan Thiun Chai & Anor* [1932] MLJ 74 (refd)
15 *Koh Mui Keow* v *R* [1952] MLJ 214

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 173(b), 178, 342

Appeal from: Criminal Trial No 58-26-83 (High Court, Penang)

M Nadchatiram for the appellants.
Su Geok Yiam (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the grounds of decision of the court): We have allowed this appeal and now proceed to give our reasons.

The appeal was against the refusal of the learned trial judge to permit the withdrawal of plea of guilty by the two appellants who were the second and third accused in the High Court. They were jointly charged with one Ooi Lam Chin ('Ooi' for short), who was the first accused, for trafficking in dangerous drugs in furtherance of a common intention on the following terms:

> That you jointly on the 18 March 1983 at about 6 am at Badak Mati, Mukim 4, Sungai Bakap in the District of Nibong Tebal, in the state of Penang, in furtherance of the common intention of you all, did on your own behalf traffic in dangerous drugs, to wit, 5,253 gm of heroin, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and thereby committed an offence punishable under s 39B(2) of the same Act, read with s 34 of the Penal Code.

Both the appellants were convicted and sentenced to death. It should be noted at this stage that the Dangerous Drugs Act 1952 was amended by Act A553 on 14 April 1983 which, inter alia, made offences under s 39B punishable with mandatory death sentence. Since the offence alleged to have been committed by the appellants and Ooi was prior to the amendment, they were liable on conviction either to life imprisonment or death.

At all relevant times, the appellants and Ooi were represented by counsel, and when hearing commenced on 5 April 1988 all the three of them had pleaded not guilty. But, after recording evidence-in-chief of Inspector Ng Eng Hoi (PW1), the two appellants through their counsel had indicated to the court that they wished to change their plea. The learned trial judge could have refused to entertain the change of plea and proceeded with the trial to its conclusion.

Alternatively, he could have accepted their plea of guilty but adjourned the sentence until after the trial of

Ooi, the co-accused unless of course they were required to give evidence as witness (see *Toh Ah Loh & Mak Thim* v *R*[1] and *Seet Ah Ann* v *PP*[2]). In exercise of his discretion, the learned judge had, however, decided to deal with the appellants first and adjourned the trial of Ooi.

The appeal record showed that the defence counsel and the DPP saw the learned judge in chambers at about 2.45 pm, and there was a request by defence counsel for time to consider a change of plea by the two appellants. The learned judge quite properly adjourned the hearing to the following day. When the case resumed on 6 April, the notes of proceeding recorded by the learned judge read as follows:

> Charge read to the second and third accused separately.
> Understands the charge.
> Both accused plead guilty to the charge.
> Understand the consequences and nature of their plea of guilty.
>
> DPP submits facts of the case.
>
> Facts explained and admitted by both the first and second accused.
>
> Plea of guilty accepted.
>
> Accordingly, I convict them.

During the plea in mitigation Dr Rajkumar of the Psychiatric Department, General Hospital Penang, was called and gave evidence on the mental state of the appellant. The doctor testified that the first appellant was a dull person with below average intelligence. The learned judge then made an order under s 342(ii) and (iii) of the Criminal Procedure Code remanding the first appellant for two weeks in a mental hospital for observation, and adjourned the case to 18 April for sentence.

When the case resumed on 18 April the first appellant was certified fit to plead, but Ms Mahadevi informed the court that both the appellants now wished to retract their plea of guilty on the following grounds:

(1) Second accused (first appellant) when he instructed counsel did not understand the charge when read to him. He was not feeling too well. He was feeling giddy and wanted to sit down. He did not realize that he was pleading guilty to a charge which might carry a death sentence.

(2) Third accused (second appellant) wanted to withdraw and to proceed with the trial because he was surprised by the statement of facts by the DPP.

The learned judge took time to consider the application, and at 2.15 pm he made the order refusing to permit the appellants to change their plea.

The learned judge found no extenuating circumstances to merit the lesser sentence of life imprisonment. In his written judgment, he referred to four decisions of the Federal Court, namely, *Loh Hock Seng & Anor* v *PP*;[3] *Oo Leng Swee & Ors*;[4] *Chang Liang Sang & Ors* v *PP*;[5] and *PP* v *Tan Hock Hai*.[6] It was in compliance with the current sentencing policy on trafficking in hard drugs, that the learned judge sentenced both the appellants to death.

At this juncture it is necessary to refer briefly to the statement of facts given by the DPP, to which both the appellants had admitted before the learned judge. The appellants admitted that on the date and place as stated in the charge, they were arrested in two separate motor cars. The second appellant was the driver of a Mazda car in which 10.6 gm of heroin together with other incriminating exhibits were recovered. Ooi was the driver of a Colt Gallant car in which the first appellant was a passenger. In this second motor car, the police found 5,262 gm of heroin hidden in a secret compartment. Other exhibits including a plastic packet containing 6,861 gm of caffeine were also recovered. On revisiting the scene of arrest, the police found a wooden shed about half a mile away from the place where the two vehicles had been ambushed. They found other incriminating exhibits in and around the shed. Police investigation revealed that the two appellants and Ooi had used the wooden shed on the evening of 17 March 1983 and that they had left the place at about 6.00 am the following morning. Investigation also revealed that they were jointly trafficking in 5,253 gm of heroin.

The main issues before us were therefore whether the learned judge was correct in holding that the appellants' plea of guilty was unequivocal, and also whether he was correct in law in refusing to allow the appellants to retract their plea notwithstanding the reasons given.

In his oral judgment the learned trial judge had relied on *R* v *McNally*[7] for holding that whether a plea of guilty might be withdrawn was entirely one for the discretion of the trial judge. Although the power was discretionary, it was pertinent to observe that in *McNally's* case[7] no reason at all was given to the trial judge by the appellant for wishing to change his plea, and Lord Goddard CJ in delivering the judgment of the Court of Criminal Appeal also found that it was 'obvious' that he had no grounds. Further, in *McNally's* case[7] the appellant and other accused were charged with warehousebreaking and housebreaking. They all except one pleaded guilty, but were not sentenced until after the trial of the one accused, who claimed to be tried. As such, the trial judge had all the relevant facts before him and could see that there was no ground at all for allowing the appellant to withdraw his plea before sentence. It was in these circumstances that the appellate court upheld the lower court's decision in refusing the appellant permission to retract his plea.

We had no doubt that *McNally's* case[7] was rightly decided. Although the trial judge had the power to determine whether a plea might be withdrawn before sent-

ence, the power was clearly discretionary and must be exercised judicially and on valid grounds, depending on the facts and circumstances of each case. In fact, in *McNally's* case,[7] Lord Goddard CJ had indicated that the court should allow an accused person to change his plea of guilty if there was a question of mistake or misunderstanding, or that it would be desirable on any ground that the accused should be allowed to join issue.

Reverting to the appeal before us it was pertinent to note that during the trial, the appellants had retracted their plea on two occasions. The first change of plea, from not guilty to guilty on 6 April, was accepted without any fuss, but the second retraction on 18 April, from guilty to the original plea of not guilty, had apparently caused some difficulties in determining the proper practice and procedure to be followed. The second important point to note was that, although the death sentence was not mandatory in this case because the alleged offence was committed before the 1983 amendment came into force, in practice the trial judge was bound by current sentencing policy to pass the death sentence. Lastly, it must be borne in mind that the charge against the appellants had reference to s 34 of the Penal Code.

In a trial before a single judge, s 178 of the Criminal Procedure Code provides:

> (i) When the court is ready to commence the trial, the accused shall appear or be brought before it and the charge shall be read and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried.
> (ii) If the accused pleads guilty the plea shall be recorded, and he may be convicted thereon.
> (iii) If the accused refuses to plead or does not plead, or if he claims to be tried, the court shall proceed to try the case.

There appears to be no provision in the Criminal Procedure Code to govern expressly the procedure to be followed when there is a retraction of plea either from a claim to be tried to guilty, or vice versa in the middle of a trial. There was no suggestion in the arguments before us that once the accused had made a plea at the commencement of a trial, the court had no power to accept any change of such a plea. In non-capital cases, there can be no doubt, that the law in this country has always been that the courts are empowered to entertain a change of plea, provided the power is exercised judicially and on valid grounds, either at the commencement or in the course of the trial. (See judgment of Rigby J in *PP* v *Sam Kim Kai*[8]).

In fact in *Abdul Mormin* v *PP*[9] the Court of Appeal consisting of Poyser CJ, McElwaine CJ (SS) and Gordon-Smith Ag JA held at p 249:

> It is in the discretion of the magistrate whether he will allow a plea of guilty to be withdrawn. That discretion must be used judicially and it is undesirable to attempt to lay down any hard and fast rule as to how the discretion should be exercised.

However, there had been some doubts as to when the application to withdraw a plea of guilty could validly be made. In *Wong Sin Yeow* v *PP*[10] Wan Suleiman J (as he then was) expressed the following views:

> It was held in *Abdul Mormin* v *PP* [1939] MLJ 323 that until a court is functus officio it can in a proper case reject a plea of guilty which it may have accepted, and that it is within the discretion of the court whether or not to allow such a plea to be withdrawn, which discretion must be exercised judicially. I am inclined to the view that in this appeal, having recorded a conviction against the appellant, the learned magistrate was functus officio and cannot therefore permit the plea to be withdrawn.

But, the learned judge went on to state in the alternative that even if the magistrate had not been functus officio, the discretion to permit an accused person to withdraw a plea of guilty following *PP* v *Sam Kim Kai*,[8] there was discretion to allow the retraction of plea before sentence.

Having considered the judgment of the House of Lords in *S(An Infant) By Parsons (His Next Friend)* v *Recorder of Manchester & Ors*[11] which was followed by Gunn Chit Tuan J (as he then was) in *PP* v *Jamalul Khair*,[12] it seems clear that the functus officio argument cannot have any application in considering a withdrawal of plea of guilty before sentence, where the conviction and sentence are before the same court. This is inherently clear on careful reading of the judgment in *R* v *Riley*[13] which must be distinguished from *R* v *McNally*.[7] It is settled law that a judge can entertain an application by an accused person to retract a plea of guilty at any time before the case is finally disposed of by sentence. In the instant appeal, the learned trial judge was therefore correct in law when he held that a plea of guilty, even though unequivocal, might be changed at any time before sentence. We would hasten to add, however, that the power must be exercised judicially and on valid grounds. It is equally settled practice that where the plea of guilty is equivocal, ie where it is not clear, or is doubtful or qualified, the plea must in law be treated as one of not guilty and the court shall proceed to try the case as required by s 178(iii) of the Criminal Procedure Code.

Both the DPP and counsel for the appellants were unable to show us any authority as to the power of High Court judges to accept a plea of guilty in capital cases. However, counsel for the appellants had drawn our attention to the following commentary in Sarkar, *Criminal Procedure Code*, at p 451:

> Sub-sec (2): (Acceptance of Plea of Guilty And Conviction). It is open to the court to accept or not the plea of guilty. In a capital offence it would be safer not to do so (Chinna, 23 M 151, 154; Gobardhan, 4 BLR App lOl; Shankar, A 1926, A 318: 27 Cr LJ 449; Achar, A 934 S 204; Hasaruddin,

A 1928. C 775: 30 Cr LJ 508; Laxnva, 19 Bom LR 356) but to accept and pass sentence on a plea of guilty is not illegal (Manjoo, A 1923, N 251; Vishwanath, 1935 Nag 492). It is the settled practice not to accept a plea of guilty without examining the accused and finding out whether he really understands to what he was pleading to (Kassim, 26 Cr LJ 177; Keshab, 18 Cr LJ 742; Vishwanath, 46 Cr LJ 357; Nga Ywa, 12 R 616; Abdul Kader, A 1947, B 345). If proper safeguards are taken, a plea of guilty to a capital charge may be accepted. Such safeguards include representation by counsel who must be in a position to answer the question of the court (Abdul Kader, sup). A plea of guilty may be recorded at a later stage of the trial (Shyama, A 1934, p 330).

A confession of guilt does not become a plea of guilty unless and until it is accepted. If not accepted, the confession ought not to be recorded. In such cases the practice is to treat it as a plea of not guilty (Abdul Kader, sup; see Md Yusuf, 58 C 1214, 1219) and to proceed with the trial (Abdul Kader, sup; Hasaruddin, A 1928, C 775; Surjan, A 1914, A 558; Chinna, 23 M 151; Keshao, A 1917, O 362).

Where the plea of guilty is not clear, or it is doubtful or qualified, the court should no doubt proceed with the trial (Bhadu, 19 A 119; Deoki, 5 ALJ 157; Hasaruddin, 30 Cr LJ 508; Achar, 36 Cr LJ 324). As to what amounts to an admission of guilt, see notes to s 243 ante, p 405. Conviction on a plea of guilty is not sustainable when the facts alleged or proved by the prosecution do not amount to an offence (Ramaswami [1955] 1 MLJ 63: A 1954, M 1020; Niranjan, A 1954, C 82; Bantra, A 1960, Mys 177; see notes to s 412 post).

The safeguards referred to in the above commentary are relevant to our s 173(b) of the Criminal Procedure Code which provides:

If the accused pleads guilty to a charge whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon: provided that before a plea of guilty is recorded the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

In the absence of any authority to the contrary, we could not find anything in the Criminal Procedure Code to prevent a judge of the High Court from accepting a plea of guilty in capital cases, and to pass death sentence on such plea, provided proper safeguards were taken including those required by s 173(b) of the Criminal Procedure Code.

Failure to do so would render the plea of guilty invalid, and in such event the question of exercising a discretion to permit an accused person to change his plea could not arise at all. A plea of guilty must be valid and unequivocal, and in order to determine the validity of a plea of guilty, the safeguards which must be followed might be stated as follows:

(i) The court must ensure that it is the accused himself who wishes to plead guilty. Thus in *R* v *Tan Thian Chai & Anor*,[14] Whitley J held that an accused person should plead guilty or claim to be tried by his own mouth and not through his counsel.

(ii) The court must ascertain that the accused understands the nature and consequences of his plea.

(iii) The court must ascertain that the accused intends to admit without qualification the offence alleged against him.

Thus, it is insufficient that the plea of guilty under safeguard (i) is unequivocal if the other safeguards are not complied with. In capital cases, for compliance with safeguard (ii) it is not sufficient for the judge to merely and formally record that 'The accused understands the nature and consequences of his plea of guilty'. In *Koh Mui Keow* v *R*[15] Brown J ruled that in serious cases which warrant a sentence of imprisonment, and where the charge contained one or more ingredients or questions, and the accused was not represented by counsel, each ingredient and each question involved should be explained by the magistrate to the accused. In that case, a retrial was ordered because the appellate judge was not satisfied that the accused had understood and admitted each and every allegation in the charge. In capital cases, we are of the view that even if the accused is represented by counsel when he pleads guilty, there must be some indication on record to show that the accused actually knows not only the nature of his plea of guilty to the charge, ie the nature of the capital offence he is pleading guilty to, but also the consequences of his plea, ie there will be no trial and that the sentence of death may be imposed on him even though such sentence is not mandatory.

As regards the third safeguard, it is an established practice that on a plea of guilty, the prosecuting officer would supply to the court the statement of facts constituting the offence with which the accused is charged. The statement is then read out and explained to the accused. Unless the accused admits the facts without qualification, the practice is to treat the plea as a plea of not guilty. This safeguard is of the utmost importance in serious cases. In capital cases, we suggest that the statement of facts supplied to the court should first be read by the judge himself to enable him to decide whether the facts alleged amount to an offence as contained in the charge. It is only when he is so satisfied, that the statement will be read out to the accused. If the accused admits the statement with qualification or if his admission is not clear or doubtful, then the court should proceed with the trial.

Let us now consider the validity of the reasons or grounds given by the appellants for wishing to change their plea. The reasons given by the first appellant when changing his plea from not guilty to guilty on 6 April were firstly, he did not understand the charge; secondly, he was not feeling well, and lastly he did not realize that he was pleading guilty to a charge which carried a death sentence. In other words the reason given was that he did not understand the nature and consequences of his plea.

Although in his written grounds of judgment, the learned judge was satisfied that both the appellants understood the nature and consequences of their plea, the notes recorded on 6 April did not indicate at all that the appellants had been told or knew that the offence to which they had pleaded guilty carried the death sentence although it was not mandatory. They were also not told that even though the death sentence was not mandatory, in view of current sentencing policy on trafficking in hard drugs, the death penalty would be imposed in the absence of most exceptional circumstances. In our view on this ground alone, there was a breach of proper safeguards rendering the plea of guilty on the capital charge invalid. Merely because they were represented by counsel, it could not be assumed in the circumstances that the appellants actually know of the consequences of their plea of guilty.

With regard to the second appellant, the reason advanced was that he was surprised by the statement of facts given by the DPP. In other words, he did not admit the statement of facts, and even if he did, the admission was with qualification. Our first observation was that the statement of brief facts was not at all satisfactory, having regard to the nature of the offence as alleged in the charge. The statement was completely silent about the alleged commission of the trafficking offence in furtherance of a common intention under s 34 of the Penal Code. It must be assumed that the 5,253 gm of heroin stated in the charge was the total amount of dangerous drug recovered from three separate places at different times, viz from the two motor cars and the wooden shed. Nor did the statement disclose what the appellants were supposed to be doing at the wooden shed the previous evening. Although the statement did not say so, it was the learned judge himself who had to supply the missing vital link by stating in his written judgment that the appellants were engaged in manufacturing heroin. The appellants had not been given the opportunity whether to admit or deny that they were involved in the manufacture of heroin in the wooden shed, if that was supposed to be the object of the common intention. In our opinion, they were entitled to know what was the nature of the common intention alleged against them. The statement of facts did not disclose or materially reflect the offence with which the appellants were charged, and as such the appellants' admission to the defective statement could not constitute a valid and unequivocal plea of guilty. Further, in mitigation of sentence, the second appellant stressed the point that only 10.6 gm of heroin were found in the motor car which he was driving and not 5,253 gm as stated in the charge. The common intention aspect of the alleged offence was patently lacking in the statement of facts, and it was little wonder that the second appellant was surprised by the DPP's statement and wished to withdraw his plea of guilty.

In capital cases, we ruled that a plea of guilty might be accepted by the court if proper safeguards were taken to ensure that the plea was valid and unequivocal. Whether a guilty plea was valid and unequivocal was a question of mixed law and fact, but the validity of the plea must first be established before the plea could be said to be unequivocal. We also ruled that in capital cases, a trial judge had the discretionary power to permit an accused person to change his plea at any time before sentence, but the discretion must be exercised judicially and on valid grounds. Where, however, the accused wished to change his plea of guilty for reasons which gave rise to a reasonable doubt as to the validity or unequivocality of the guilty plea due to failure to take proper safeguards, then the court had no discretion but to permit the accused to retract his plea.

On the facts and circumstances of the present appeal, we were satisfied that there was a breach of proper safeguards when the plea of guilty of the appellants were accepted. There were grave doubts that the appellants understood the nature and consequences of their plea. Equally, there were grave doubts that the appellants intended to admit without qualification the offence alleged against them. In the circumstance, the appellants ought to have been allowed to change their plea of guilty to their original claim to be tried.

Accordingly, the appeal of both the appellants were allowed. The conviction was quashed and the death sentence set aside. We also ordered a re-trial against the appellants before another judge, and they were to be produced before the High Court in Penang for mention within one week to enable a new date of hearing to be fixed.

Appeal allowed.

Solicitors: *Mahadevi Nadchatiram & Partners.*

Reported by *Prof Ahmad Ibrahim*